RECEIVED
JAN 3 1 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In the Matter of	)	MM Docket No. 92-195
	)	
Amendment of Section 73.202(b),	)	RM-7091
Table of Allotments,	)	RM-7146
FM Broadcast Stations.	)	RM-8123
(Beverly Hills, Chiefland, Holiday,	)	RM-8124
Micanopy, and Sarasota, Florida)	)	

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Pasco Pinellas Broadcasting Company ("Pasco") herein opposes the Application for Review filed by Dickerson Broadcasting, Inc. ("Dickerson"), licensee of Station WEAG-FM, Starke, Florida. In opposition, the following is stated:

The focus of Dickerson's Application for Review is the Notice of Proposed Rule Making ("NPRM") issued in this proceeding, 7 FCC Rcd 5910 (Chief, Allocations Branch 1992), regarding an FM channel allotment at Beverly Hills, Florida. The NPRM was issued in response to a September 29, 1989 rulemaking petition filed by Heart of Citrus, Inc. ("Heart"), permittee of Station WXOF(FM), Beverly Hills, Florida. Heart proposed that WXOF's frequency, Channel 246A, be upgraded to Channel 246C3 and that the WXOF license be modified accordingly. But, in response to a counterproposal filed by Sarasota-FM, Inc. ("Sarasota"), licensee of Station WSRZ(FM), Sarasota, Florida, and Gator Broadcasting Corporation ("Gator"), licensee of Station WRRX(FM), Micanopy, Florida, the Commission instead substituted Channel 292C3 for Channel 246A at Beverly Hills. Report and Order in MM Docket No. 92-195, 8 FCC Rcd 2197 (Chief, Allocations Branch 1993) ("R&O"). Thereafter Dickerson

No. of Copies rec'd 0+9
List A B C D E

filed a Petition for Reconsideration, which was denied by Memorandum Opinion and Order, DA 93-1364 (Chief, Policy and Rules Div., released December 8, 1993) ("MO&O").

Dickerson complains that the allotment of Channel 292C3 to Beverly Hills took it by surprise and precludes WEAG-FM from increasing its facilities from 3 kilowatts to 6 kilowatts. Through its Application for Review, Dickerson makes three arguments:

1. The Commission's allotment of Channel 292C3 to Beverly Hills contravenes Section 4(b) of the Administrative Procedures Act ("APA"), 5 U.S.C. §553(b)(3), because the summary of the NPRM published in the Federal Register did not provide an explicit indication that a channel other than that proposed by Heart, Channel 246C3, might be allotted.

2. The Commission erred in applying the distance separation standards in effect prior to October 2, 1989.

3. The Commission purportedly failed to consider Dickerson's substantive argument set forth in its Petition for Reconsideration.

As demonstrated herein, Dickerson's arguments must be rejected.

1. Allotment of a Channel Other than the One Specifically Mentioned in the NPRM Does Not Contravene the APA.

Commission and court precedent make clear that, in response to a counterproposal or on its own initiative, the Commission may, without issuing a new notice, allot to a community an FM frequency other than that specifically proposed in a notice of proposed rule making.

Under Section 4(b) of the APA, the Commission must publish in the Federal Register a notice of proposed rule making which sets

forth "either the terms or substance of the proposed rule or description of the subjects and issues involved." Here, it is undisputed that a summary of the NPRM was published in the Federal Register, 57 FR 42537 (September 15, 1992). That summary gave all, including Dickerson, notice that the Commission was considering changing the allotment at Beverly Hills, Florida. Notice that a channel different than the one specifically mentioned in the summary might be allotted is not required.

The Commission previously has held that, because its rulemaking procedures permit the filing of counterproposals, alternate channel allocations are properly within the scope of an allotment rulemaking notice. "We are not required by the Administrative Procedure Act to issue separate Notices for every channel under consideration." Pinewood, South Carolina, 5 FCC Rcd 7609, 7610 (¶8) (1990). This principle has been long established. E.g., Stockton and Modesto, California, 4 FCC Rcd 839, 842 (1966); Atlanta, Georgia, 55 FCC 2d 62, 65 (1975); Medford and Grants Pass, Oregon, 45 RR 2d 359 (Chief, Broadcast Bureau 1979), rev. denied, FCC 80-661 (released November 6, 1980); accord, e.g., Wisconsin Dells, Wisconsin, 35 FCC 2d 605, 608-09 (1972).

In Stockton and Modesto, supra, the Commission allotted, inter alia, Channel 19 to Stockton, California. In response to a petition for reconsideration, the Commission moved Channel 19 to Modesto and allotted Channel 31 to Stockton. A prospective applicant for Channel 19 at Stockton sought reconsideration, arguing that Section 4 of the APA had been violated in that interested persons and organizations in Stockton were not afforded

an opportunity to oppose removal of Channel 19. 4 FCC 2d at 839-841. The Commission responded that the procedures followed were not defective and that appropriate notice of the general subject matter of the rulemaking -- UHF television channel allocations -- was properly given. Id. at 842.

In Atlanta, Georgia, the notice of proposed rule making indicated that the Commission was considering substituting Channel 221A for Channel 237A at Ocilla, Georgia. Olivia Broadcasting Company ("Olivia") had filed an application for Channel 237A in Ocilla. It did not participate in the rulemaking because the proposed substitution of Channel 221A was satisfactory to its needs. 55 FCC 2d at 64. The Commission, however, allotted Channel 249A in response to comments by another party. Like Dickerson here, Olivia argued that the Commission failed to abide by Section 4 of the APA. The Commission responded: "Despite contentions to the contrary, there has been full compliance with the requirements of the Administrative Procedure Act. As concerns Ocilla, the Notice instituting this proceeding stated that the Commission was considering the substitution of Channel 221A for 237A; this clearly constitutes sufficient notice that a channel assignment change at that community was being contemplated without further need to specify what other channel change might be made." Id. at 65 (citing Owensboro on the Air, Inc. v. United States, 262 F.2d 702 (D.C. Cir. 1958), cert. denied, 360 U.S. 911 (1959)).

In Medford and Grants Pass, the Commission's notice of proposed rule making proposed removing the noncommercial educational reservation on Channel 18 at Medford and adding such a reserva-

tion on Channel 8 to reflect its use by an educational licensee. However, in response to a request, the Commission decided to reassign Channel 18 to Grants Pass and retain its noncommercial educational reservation. That action led the Commission to conduct a search for another channel for Medford. Channel 12 was assigned. The two parties then filed petitions for reconsideration arguing that the Commission did not give adequate notice pursuant to the APA. The Commission disagreed: "[T]here is no obligation to set forth each and every item or aspect of the rule changes to be considered. In fact, there is no way to know all the possibilities in advance." 45 RR 2d at 362 (¶11).

In Wisconsin Dells, the Commission made clear that the filing of conflicting counterproposals is part of the rulemaking process:

> First, the standards to govern such filings [i.e., counterproposals] are enunciated, but equally importantly, we have put interested parties on notice that counterproposals may well be advanced and that they ignore this possibility at their peril. In point of fact, the same argument about a lack of notice could be made at any case where a counterproposal was filed. . . . In our view the notice was adequate to advise those interested that attention should be paid to more than just the original filing.

35 FCC 2d at 608-09 (¶10).

Court precedent also supports the Commission's practice. The APA "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule." California Citizens Band Association v. United States, 375 F.2d 43, 48 (9th Cir. 1967), quoted with approval in Spartan Radiocasting Co. v. FCC, 619 F.2d 314, 321 (4th Cir. 1980). Moreover, "the requirement

of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions." International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n. 51 (D.C. Cir. 1973); accord, e.g., Owensboro, supra; Logansport Broadcasting Corp. v. U.S., 210 F.2d 24, 28 (D.C. Cir. 1954); see Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 488-89 (2d Cir. 1971). As the court in Logansport stated, the APA "requires only that the prior notice include 'a description of the subjects and issues involved.' We think the procedure followed by the Commission amply fulfilled this requirement. . . . Surely every time the Commission decided to take account of some additional factor, it was not required to start the proceedings all over again. If such were the rule, the proceedings might never be terminate". 210 F.2d at 28, quoted with approval in Owensboro.

Owensboro, cited in the MO&O, is on point. There the Commission issued a rule making proposal in which it proposed that VHF Channel 7 in Evansville, Indiana, be reserved for educational use and that UHF Channel 56 in Evansville be released from educational reservation. However, in response to a counterproposal received, the Commission decided to delete Channel 9 from Hatfield, Indiana, and assign it to Evansville for use as a noncommercial educational station. Two parties that had applied for Channel 9 at Hatfield and were engaged in a comparative proceeding, appealed the Commission's action. They argued that the Commission's action was fatally defective because the rulemaking notice made no mention of

Channel 9. The court rejected the argument and specifically held that there had been a "description of the subjects and issues involved" as required by the APA.[1/]

In sum, the NPRM here provided sufficient notice under the APA that the Commission was considering changing the FM allotments at Beverly Hills, Florida. Although the NPRM and the Federal Register summary discussed Channel 246C3, long standing precedent makes clear that the Commission was free, without issuing another rule making notice, to allot a different channel to Beverly Hills. Dickerson's procedural rights have not been violated.

2. The Commission's Former Distance Separation Rules Properly Were Applied Here.

Dickerson argues that since the Commission, in response to a counterproposal, allotted a channel to Beverly Hills different from that specifically proposed by Heart, the Commission could not apply its former FM spacing requirements, now set forth in Section 73.213(c)(1) of the Rules. This argument is simply a variation of the flawed premise discussed above -- i.e., if the Commission wishes to allot a channel other than that specified in the rule making notice, it must start the rule making proceeding anew.

It is undisputed that Heart's rule making petition was filed September 29, 1989, and thus could rely upon the former spacing

---

1/ The court also noted that the complaining parties had actual notice of the proposal to delete Channel 9 from Hatfield. In its Application for Review, Dickerson attempts to distinguish Owensboro on the basis of that fact. The argument is not well taken. The court in Owensboro specifically found the rulemaking notice sufficient. Thus, the fact that the Hatfield applicants also had actual notice is irrelevant here. See Pinewood, South Carolina, 5 FCC Rcd at 7611 n. 4.

rules, which were modified effective October 2, 1989. See Second Report and Order in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989) ("Distance Separation Order"). Dickerson would have the Commission modify post hoc the Distance Separation Order to specify that a post-October 2, 1989 counterproposal to a pre-October 2, 1989 allotment petition must comport with the current distance separation rules, even though the original proposal is subject to the former rules. The Distance Separation Order does not so state.

Dickerson points out that Section 73.213(c) of the Rules as adopted in the Distance Separation Order stated that new stations "on channel allotments made by order[s] granting petitions to amend the Table of FM Allotments which were filed prior to October 2, 1989," may be authorized in accordance with the previous separation rules. See 4 FCC Rcd at 6385.[2/] Dickerson then argues that the Commission did not "grant" Heart's rule making petition. That is clearly not the case. Heart requested allotment of a Class C3 channel to Beverly Hills and modification of the WXOF license to specify operation on that channel. That is exactly what the Commission did. The fact that a different channel than the one proposed by Heart was adopted is immaterial. See e.g., Pinewood, South Carolina, 5 FCC Rcd 7609 (1990).[3/]

[2/] Section 73.213(c) was subsequently amended for unrelated reasons.

[3/] Dickerson also argues in a single paragraph that adoption of the rule making proposal constitutes a modification of its license for WEAG-FM. No such modification occurred. Dickerson itself acknowledged that he has received neither a construction permit nor a license to operate with six kilowatts. For that matter, Dickerson has not even submitted an application to do so. (continued...)

3. Dickerson's Substantive Arguments are Unavailing.

Dickerson complains in its Application for Review that the Commission's staff, in considering its pro se Petition for Reconsideration, did not consider the substantive arguments it advanced. But in fact, the Commission's staff in denying the Petition for Reconsideration noted that the six kilowatt operation of WEAG-FM would result in additional service to approximately 28,554 persons while the Class C3 upgrade for WXOF will result in additional service to approximately 99,884 persons. MO&O at n. 3. In its Application for Review, Dickerson cites a portion of its Petition for Reconsideration in which it stated that allotment of Channel 292C3 to Beverly Hills would preclude four Class A stations from increasing their facilities to six kilowatts and that a three kilowatt to six kilowatt upgrade for Channel 293A at Ponte Vedra Beach, Florida, (supposedly would add over 200,000 persons to the service area.[4/] Dickerson, however, presented no documentation to support its coverage claims. In contrast, Sarasota and Gator submitted an engineering statement on October 30, 1992, prepared by Bromo Communications, demonstrating that adoption of the counter-proposal would result in a net service-area population gain of

---

[3/](...continued)
Section 316 of the Communications Act has no bearing on WEAG-FM's situation.

[4/] At the time the Petition for Reconsideration was filed, two applicants for the Ponte Vedra allotment were engaged in a comparative proceeding. That proceeding is now before the United States Court of Appeals for the District of Columbia Circuit. The other stations purportedly precluded from increasing to six kilowatts were WCJX, Channel 293A, Five Points, Florida; WKBX, Channel 292A, Kingsland, Georgia; and Dickerson's WEAG-FM.

2,239,430 persons. Thus, even if Dickerson's substantive arguments are given full weight, notwithstanding the lack of substantiation, it is obvious a greater benefit to the public results from the allotments made in the R&O and affirmed in the MO&O.

WHEREFORE, In light of all circumstances present, the Application for Review filed by Dickerson Broadcasting, Inc. should be DENIED.

PASCO PINELLAS BROADCASTING COMPANY

By _____
DENNIS F. BEGLEY

By _____
MATTHEW H. McCORMICK

Its Counsel

Reddy, Begley & Martin
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037

January 31, 1994

CERTIFICATE OF SERVICE

I, Marilyn Phillips, hereby certify that on this 31st day of January, 1994, I caused copies of the foregoing **OPPOSITION TO APPLICATION FOR REVIEW** to be placed in the U.S. Postal Service, first class postage prepaid, or hand delivered, addressed to the following persons:

Michael C. Ruger, Chief*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 8318
Washington, D.C. 20554

Harry F. Cole, Esquire
Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036
Counsel for Dickerson Broadcasting, Inc.

A. Wray Fitch, Esquire
Gammon & Grange, P.C.
8280 Greensboro Drive
7th Floor
McLean, Virginia 22102-2807
Counsel for Heart of Citrus, Inc.

David D. Oxenford, Jr., Esquire
Fisher, Wayland, Cooper & Leader
1255 - 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
Counsel for Gator Broadcasting Corporation

Michael H. Bader, Esquire
David G. O'Neil, Esquire
Haley, Bader & Potts
4350 N. Fairfax Drive
Suite 900
Arlington, Virginia 22203-1633
Counsel for Sarasota FM, Inc.

Peter Guttmann, Esquire
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
Counsel for White Construction Co., Inc.

John M. Spencer, Esquire
Leibowitz & Spencer
One Southeast Third Avenue
Suite 1450
Miami, Florida 33131
Counsel for Highland Media Company, Inc.

Irving Gastfreund, Esquire
Kaye, Scholer, Fierman, Hays & Handler
901 - 15th Street, N.W.
Suite 1100
Washington, D.C. 20005
Counsel for Roper Broadcasting, Inc.
and WGUL-FM, Inc.

Marilyn Phillips

*HAND DELIVERED